

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEWAYNE MCNAIR,	§	
	§	No. 295, 2020
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	
STATE OF DELAWARE,	§	Cr. Id. No. 1212003086A(N)
	§	
Plaintiff Below,	§	
Appellees.	§	

Submitted: March 17, 2021

Decided: May 18, 2021

Before **SEITZ**, Chief Justice; **VALIHURA** and **TRAYNOR**, Justices.

ORDER

This 18th day of May 2021, the Court has considered the parties’ briefs and the record on appeal, and it has determined that the judgment of the Superior Court denying the appellant’s motion for postconviction relief should be affirmed, with one clarification, on the basis of the Superior Court August 7, 2020 Order adopting the Commissioner’s October 29, 2019 Report and Recommendation.¹

The Superior Court rejected—correctly, in our view—McNair’s claim that his trial counsel was ineffective for not moving for judgment of acquittal on the charge of possession of a firearm during the commission of a felony (“PFDCF”). We agree

¹ *State v. McNair*, 2019 WL 5678359 (Del. Super. Ct. Oct. 29, 2019).

that there was legally sufficient evidence to justify McNair’s conviction on that charge and that the motion McNair claims his counsel should have made would have been futile. But we observe that Paragraph 20 of the Superior Court’s order could be read as basing its conclusion on the notion that McNair, as the custodian of the rental car in which the firearm was found, was presumed to have dominion and control—and, therefore, possession—of the firearm.

In *LeCates v. State*, this Court recognized that possessing a deadly weapon during the commission of a felony “requires more than merely possessing a gun[,]”² using the traditional “dominion and control” standard:

[T]he word “possession” has a more limited meaning [than the general definition of possession]; . . . it requires the elements of availability and accessibility. We hold that a felon is in “possession” of a [firearm], within the meaning of [PFDCF], only when it is physically available or accessible to him during the commission of the crime. General “dominion and control” of a weapon located elsewhere, and not reasonably accessible to the felon, obviously is not the test under [PFDCF].³

In this context, “[t]he State must establish physical availability and accessibility *in addition to* actual or constructive possession.”⁴ To establish constructive possession of the firearm, the State needed to present evidence that

² *LeCates v. State*, 987 A.2d 413, 419 (Del 2009).

³*Id.* (first alteration in original) (quoting *Mack v. State*, 312 A.2d 319, 322 (Del. 1973)). To conform with McNair’s charges here, we have substituted terms used by the *LeCates* court in the quote above as follows: “firearm” for “deadly weapon” and “PFDCF” for “PDWDCF.”

⁴ *Id.* at 421 (emphasis in original).

McNair knew the location of the firearm, had the ability to exercise dominion and control over the firearm, and “intended to guide the destiny” of the firearm.⁵

We conclude that the State presented sufficient evidence, when viewed in the light most favorable to the prosecution, to support the jury’s conclusion that the firearm was accessible to McNair and that he had constructive possession of it while simultaneously possessing cocaine. The arresting officer testified that the gun was only an arm’s length from McNair—the only occupant of the car when the police stopped it—as he sat in the driver’s seat and was therefore accessible to him.

McNair told the arresting officer that the gun belonged to a friend who had been in the car earlier that day. McNair said that he asked the friend if he could look at it and admitted that, when the friend showed it to him, he held it but then handed it back to the friend. McNair, who claimed that he did not know that the friend left the gun behind, offered no explanation of why his friend, who was not in the car at the time of the stop leading to McNair’s arrest, would have left the gun in McNair’s car.

A reasonable trier of fact would be justified in rejecting McNair’s self-serving statement that the gun belonged to his friend who had, unbeknownst to McNair, left it in the car. Likewise, viewing the evidence in the light most favorable to the State, a reasonable trier of fact could find beyond a reasonable doubt that the gun was

⁵ *Id.* at 426 (citing *White v. State*, 906 A.2d 82, 86 (Del. 2006)).

accessible to McNair and that he knew it was within his reach under the car seat at all relevant times. Accordingly, a motion for judgment of acquittal on the PFDCF count, had one been made, would have lacked merit. It follows that it was not objectively unreasonable for McNair's trial counsel to forgo such a motion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Gary F. Traynor
Justice